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Supreme Court of the United States

OCTOBER TERM 1945

No. 154

MICHAEL J. CRYNE,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statement of Facts	2
Summary of Statutes Involved	8
Title 18, United States Code, Section 88	8
Title 26, United States Code, Section 2803a	8
Title 26, United States Code, Section 2814	8
Title 26, United States Code, Section 2834	8
Constitution of the United States, Amendment IV	9
Constitution of the United States, Amendment V	9
Specifications of Error To Be Advanced	9
Reasons for Granting the Writ	10
Summary of Argument	11
ARGUMENT:	
POINT A—The admission of evidence obtained as a result of interrogation of a person under arrest without advising him of his right not to answer violates his constitutional right against self-incrimination	11
POINT B—The arrest of petitioner was without probable cause and therefore illegal and all evidence obtained as a result thereof was not admissible against petitioner	15
CONCLUSION	19

152194

CASES CITED

PAGE

McNabb v. United States, 63 Sup. Ct. 608, 318 U. S. 322 15

Schuetze, In re, 299 Fed. 827 16

United States v. Clark, 29 Fed. Supp. 138 17

United States v. DePietro (D. C., W. D. N. Y.), 36 Fed. Supp. 389 15

United States v. Kallas (D. C., W. D. Wash.), 272 Fed. 742 12

Wood v. United States (U. S. C. C., Dist. of Col.), 128 Fed. (3d) 265 12

OTHER AUTHORITIES

Constitution of the United States:
Amendment IV 9
Amendment V 9

Judicial Code:
Section 240 1

U. S. Code Annotated:
Section 347 1

U. S. Code:
Title 18, Section 88 8
Title 26, Section 2803a 8
Title 26, Section 2814 8
Title 26, Section 2834 8

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of MICHAEL J. CRYNE prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered on May 23, 1945, affirming a judgment of conviction against petitioner.

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit is not yet reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 23, 1945. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code; Section 347 of U. S. Code Annotated.

Statement of Facts

On May 5, 1942 an indictment was filed against petitioner, Morris Heitner and Charles Kenneth Meierdiercks containing five counts alleging in substance that defendants on January 20, 1942, had in their possession, custody and control, at No. 8077 208th Street, Bellaire, Long Island, an illegal 374-gallon still set up; made and fermented illegal mash at said premises; carried on illegal business of distillers at said premises; illegally possessed untaxed alcohol at said premises; and that on or about and between December 14, 1941 and January 20, 1942 defendants conspired to violate the Internal Revenue Laws of the United States by operating an illegal still, making illegal alcohol, making illegal mash, and possessing illegal alcohol (fols. 8-12, incl.).

The case was tried in the United States District Court for the Eastern District of New York before Hon. Clarence G. Galston, U. S. District Judge, and a jury.

Upon the trial the indictment was severed as to Meierdiercks, who testified on behalf of the Government.

Petitioner and defendant Morris Heitner were found guilty.

Petitioner and Morris Heitner appealed to the Circuit Court of Appeals for the Second Circuit from the judgment of conviction. By a judgment entered in the Circuit Court of Appeals on May 23, 1945 said judgment of conviction was affirmed.

The only testimony during the course of the trial which was offered by the Government against petitioner was that of Charles Meierdiercks, an alleged co-conspirator, New York City Police Officers Bender and Meyer and Federal Agent Brady.

Charles Meierdiercks, a co-defendant and alleged co-conspirator, who did not stand trial with petitioner, appeared in court in the uniform of a Lieutenant-Commander

in the Navy, although he was merely in the service of the Merchant Marine, having joined after he was indicted and after he had been released on bail (fols. 212-218, incl.). Said Meierdiercks admitted that he had been convicted of crimes five separate times (fol. 222), beginning with unlawful entry in 1918, grand larceny in 1932, mail fraud in 1932, criminal contempt for violating the New Jersey Securities Act, and again for mail fraud in 1938, and had served terms of imprisonment at Sing Sing, Lewisburg Penitentiary, and at Newark, New Jersey (fols. 172, 173), and that he was under indictment in connection with the instant case (fol. 222) and that there was pending against him another indictment in Westchester County, New York State, in connection with which he was on bail in the sum of $5,000, and a further mail fraud indictment which was still pending in the United States District Court for the Eastern District of New York (fols. 250, 251). Said Charles Meierdiercks admitted that while under bail and while on parole he left the United States in violation both of the bail provision and his parole (fols. 395, 396) and that when he returned to this country at Norfolk, Virginia, he was again released on bail in the sum of $2,500, and at the time of the trial of the instant case he was still free since he was not tried together with petitioner. Said Charles Meierdiercks admitted that it was he who had taken a lease to premises 8077 208th Street, Bellaire, Long Island, in the name of one Harrison; retained the lease in his possession at all times (fol. 186); had gone to a plumbing supply house with the defendant Heitner and there purchased fittings (fols. 189, 190); brought the fittings in his car to the premises in Long Island; did the installation work; brought sugar in his car to the premises in Long Island on two separate occasions; paid for the pump and delivered the pump in his car to the premises (fols. 195-201, incl.).

With respect to petitioner, Meierdiercks testified that he first met petitioner on September 1, 1941 when he was

introduced by one Leo Handler (fol. 175); that about a week later petitioner telephoned him and told him that he was going to look at some houses in Long Island and asked whether he would come over in his car; that he met petitioner the next day and they looked at some houses in Long Island and that petitioner said that one in particular was just about what he wanted (fol. 177); that on the following day he met petitioner in Brooklyn and that he drove to the Bronx and he asked petitioner what he wanted to do with the house and petitioner said he was going to put a still in there; that petitioner further states that he wanted Meierdiercks to go to the Bronx to meet the "Shlivowitz king" (fol. 180); that petitioner then left the car and went into the house and came back with a tall fellow whom he introduced as "Moishe", who was identified as Maurice Heitner; that they got into the car and drove to 8077 208th Street; that Heitner and petitioner told the witness that they needed a lot of work done in the house to install the still and asked Meierdiercks if he would do the work; and that he agreed to do the work at a price of $200.

Edward Bender, a New York City patrolman, testified that on January 20, 1942 he was observing the front of premises 8077 208th Street in Queens County; that at about 8 P. M. he saw two men come out of the house and get into a car (fols. 70, 71); that he and his partner, Patrolman Meyer, followed the automobile in their own car up Grand Central Highway and then turned off and went back to the premises. About two minutes later the said car came back and then proceeded to speed away; that he and his partner turned around and followed the automobile up Union Turnpike and that Patrolman Meyer pulled his gun out and forced the other car to come to a stop and arrested the occupants thereof. That the witness Bender then took petitioner out of the other automobile and told him to get into the patrolmen's car; then as petitioner was getting into the car the witness heard

something drop; that he stated to petitioner that petitioner had dropped something, and that petitioner answered, "Just a nickel"; that he looked around and found a key about which petitioner would not talk; that they then turned around and drove back to the premises (fol. 76); that when petitioner was asked what he had in the house he said, "I will tell you; we have a small still there—225 gallons" (fol. 77); that they then drove to 212th Street and Hillside Avenue, where the witness contacted Federal Agent Charles Brady, who thereafter entered the automobile; that they then drove to the 205th Precinct, where the witness handed Brady the key which he had picked up from the ground in front of petitioner (fol. 78); that they drove back to the premises together with Federal Agents Miller and Gay; that the witness heard Brady say to petitioner, "Is this the key?", and that petitioner answered, "Try it and see"; Brady then opened the door and they entered the house and found the still (fol. 79).

Albert J. Meyer, the next witness, also a New York City patrolman, in substance testified to the same effect as Patrolman Bender.

Charles A. Brady, an agent of the Alcohol Tax Bureau, Internal Revenue Department, Brooklyn office, testified that when he saw petitioner after the arrest he asked him what the key was for and petitioner said, "Try it in the door and find out for yourself."

Petitioner took the stand and testified that he is married, has two children, and had no prior conviction, and at the time lived at No. 1273 Brooklyn Avenue, Brooklyn, New York, which is in the same neighborhood where Meierdiercks lived. On January 20, 1942 he met Meierdiercks in the office of the Walsh Construction Company, No. 33 West 42nd Street, where they both were applying for a job; there were hundreds of other men there and they waited for hours; they left after 5 o'clock and Meierdiercks offered to drive petitioner home. After petitioner got into the car Meierdiercks asked petitioner if he minded

stopping in Long Island first because he had to see his child, said Meierdiercks not living with his wife at the time (fols. 640-643, incl.). Meierdiercks entered a certain house where he said his wife lived, and after coming out drove down some other street and then started to follow another car which he said was being driven by a man who was having trouble with his wife; that while they were following this other car they were stopped by the two policemen (fol. 646). Petitioner testified that he had never had any dealings with Meierdiercks and had nothing to do with the still in the premises; that he never had the key to the premises in his possession; that he had never told the officers that there was a still in the premises; and that he had never been in the premises before and had no interest in the enterprise (fol. 652).

It was upon the uncorroborated testimony of Meierdiercks and the testimony of City Policemen Meyer and Bender, to the effect that they heard a key drop when petitioner was entering their automobile, and the alleged admission that there was a still in the premises, together with the testimony of Federal Agent Brady that he was told by Police Officer Bender that petitioner had dropped the key, that petitioner was convicted.

The attorney for the petitioner, during the course of the trial, made a motion to strike out the evidence given by the two police officers and the Federal agent as to what took place after the arrest upon the ground that the officers did not act with probable cause; that the officers did not have any knowledge of any offense that petitioner had committed, and did not have any knowledge at the time of the presence of the still in the premises and were acting at the time apparently in the enforcement of the federal law. This motion was denied and exception duly taken (fols. 546, 547).

Petitioner, in connection with his appeal in the Circuit Court of Appeals, complained that the alleged admission made by him after his arrest on January 20, 1942 to one

of the policemen, to the effect that they had a small still, was incompetent because he had not yet been arraigned, had not been advised of his constitutional rights, and because the arrest which preceded it was unlawful, and that the Trial Judge erred in refusing to strike out this testimony and in failing to grant the motions to dismiss for the reason that the Government had failed to establish his guilt beyond a reasonable doubt.

The Circuit Court, in its opinion in affirming the judgment of conviction, stated that the key which had dropped from petitioner's pocket was found to fit the door of the building. The record does not support this statement and this was one of the main points made by petitioner in connection with the appeal to the Circuit Court of Appeals.

Petitioner at no time admitted that the key was dropped by him, yet Agent Brady was permitted to testify that Bender had told him that petitioner had dropped the key, although Bender himself testified that he only heard something drop but did not say that he saw petitioner drop the key. The testimony of Agent Brady made it appear as a fact that the key was dropped by petitioner and the Circuit Court of Appeals, in examining the record, apparently accepted the testimony of Agent Brady, which was purely hearsay, rather than the testimony of Police Officers Bender and Meyer, who were at the scene when the incident with respect to the key took place.

The testimony of Agent Brady, which was clearly hearsay, was damaging to petitioner. This is evidenced by the fact that the jury came back with a communication with respect to the key, as a result of which the Trial Judge had the stenographer read back to the jurors the testimony as to whether Mr. Brady had asked petitioner whether the key in question was the key to the house and the answer given by petitioner, "Try it and see."

Summary of Statutes Involved

Title 18, United States Code, Section 88

This is the general conspiracy statute.

Title 26, United States Code, Section 2803a

This statute states in substance that no person shall transport, possess, buy, sell or transfer any distilled spirits unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all Internal Revenue taxes imposed on such spirits; and the penalty for such violation is a fine not exceeding $1,000 or imprisonment not exceeding five years or both.

Title 26, United States Code, Section 2814

This statute states in substance that every person intending to commence or to continue the business of a distiller shall file a bond, together with a notice of intention to begin such business, with the Collector, and the penalty for such violation is a fine of not less than $500 nor more than $5,000 and imprisonment for not less than six months nor more than two years.

Title 26, United States Code, Section 2834

This statute states in substance that it is illegal to manufacture mash, wort or wash fit for distillation or for the purpose of production of spirits or alcohol in any building or any premises other than a distillery duly authorized according to law, and the penalty for such a violation shall be a fine of not less than $500 nor more than $5,000 and imprisonment for not less than six months nor more than two years.

Constitution of the United States, Amendment IV

This amendment provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V

This amendment provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Italics writer's.)

Specifications of Error To Be Advanced

The Trial Judge erred:

(1) In permitting Federal Agent Brady to testify that the witness Bender told him that petitioner had dropped the key;

(2) In admitting in evidence statements made by petitioner as a result of questions asked by Police Officer Bender and Federal Agent Charles Brady after the arrest of petitioner;

(3) In receiving testimony thus obtained where petitioner had not been previously advised of his constitutional right;

(4) In refusing to strike out the testimony thus obtained;

(5) In permitting testimony with respect to admissions made by petitioner as a result of an arrest made without probable cause;

(6) In refusing to grant a motion to dismiss as against petitioner by reason of the fact that the testimony of Meierdiercks stood uncorroborated in all particulars;

(7) In making inconsistent rulings with respect to the admission of evidence.

Reasons for Granting the Writ

The verdict of guilty against petitioner was based upon testimony of police officers and a federal agent with respect to information elicited from petitioner as a result of inquiries made of petitioner after his arrest without advising him of his constitutional right against self-incrimination.

The verdict of guilty was based upon evidence procured by police officers and a federal agent as a result of an arrest which was made without probable cause and in violation of the unreasonable search and seizure provision of the Constitution.

That the rulings of the District Court in connection with the admission of evidence and the rulings of the Circuit Court of Appeals present important questions of law with respect to the interpretation of those clauses of the Constitution which provide against self-incrimination and unreasonable search and seizure.

There is a conflict of decisions as to whether and when information obtained from a defendant after his arrest, without advising him of his constitutional right against self-incrimination, may be used against him.

Summary of Argument

POINT A

The admission of evidence obtained as a result of interrogation of a person under arrest without advising him of his right not to answer violates his constitutional right against self-incrimination.

POINT B

The arrest of petitioner was without probable cause and therefore illegal and all evidence obtained as a result thereof was not admissible against petitioner.

ARGUMENT

POINT A

The admission of evidence obtained as a result of interrogation of a person under arrest without advising him of his right not to answer violates his constitutional right against self-incrimination.

Petitioner was arrested as soon as the automobile in which he was riding with Meierdiercks was stopped by the police officers at the point of a gun (fol. 75). The only corroborating testimony offered in the case which in anywise connected petitioner with the crime was that with relation to the key and the alleged admission that there was a 225-gallon still on the premises.

A review of the testimony shows that the automobile in which petitioner was riding was stopped at the point of a gun and that when petitioner was about to go into the patrolmen's car the patrolman heard something drop,

which he later found to be a key, and when he made inquiry with respect thereto was given the answer first that it was just a nickel and then further answers were refused. Later when petitioner was taken back to the premises in question Federal Agent Brady testified that he asked petitioner whether the key in question was the key to the premises and petitioner answered, "Try it and see."

Edward Bender also testified that when petitioner was in custody, in answer to the question of said police officer, petitioner stated that there was a 225-gallon still on the premises.

Since petitioner had been placed under arrest and was in custody of the authorities the evidence obtained from him without advising petitioner of his constitutional rights was not admissible against him at the trial.

In *United States* v. *Kallas* (D. C., W. D. Wash.), 272 Fed. 742, the Court held that before replies of a prisoner to questions asked of him by the officers who have him in custody can be admitted as a voluntary confession it must be shown that the prisoner was informed of his right to refuse to answer the questions and that any answers he chose to make might be used as evidence against him and, at page 753, stated as follows:

> "The safer and better course to pursue is to require evidence that each and every prisoner has been advised of his right to remain silent, and warned of the danger in speaking, before any statement made is admitted, rather than enter upon a more or less speculative inquiry as to whether the statements of accused were made voluntarily or not."

In the case of *Wood* v. *United States* (U. S. C. C., Dist. of Col.), 128 Fed. (2d) 265, the Court, in discussing the subject of admissibility of evidence obtained from a defendant under arrest without advising him of his constitutional rights, stated at page 277 as follows:

> "The fairer practice and, we think, the only one consistent with the court's position, *would advise the ac-*

cused in all cases, before permitting him to speak even as a volunteer, of his right to counsel and would warn him that he need not speak and, if he does, it is at his peril. This would assure fairness to the accused and foreclose the possibility that he might act in ignorance. It would eliminate the risk of reversal inherent in failure to give the advice or warning.[31] The cost to the court in time and energy would be small, and that to society in efficient administration of criminal justice would be less than the prevailing practice entails. On the other hand, the cost to the accused, especially when he is indigent, of the court's failure to follow the more open and certain way may be great. Finally, such a practice would be consonant, as the prevailing one is not, with the court's obligations to see that trial or hearing is fair and to discharge the affirmative duties which it owes to persons charged with crime, more particularly when they are ignorant or indigent or both.[32]

"To these considerations may be added strong administrative reasons for regarding knowledge as immaterial. Some apply to confessions or admissions of guilt not made in the form of a plea. Turning admissibility or waiver on knowledge raises the issue in many cases. Often as in this one it appears after the facts become hazy and disputed. As often as not it arises first on appeal or habeas corpus. Frequently it is presented on the most sketchy evidence. When this occurs the appellate court must make what in effect is a finding of fact, and in doing so must resort to doubtful inference or presumption, unless the case is to be reversed and remanded for finding on this point. This case, and others recently decided,[33] show the difficulties and the dangers of turning admissibility or waiver on knowledge, when the accused does not have counsel and the court has failed to inform or warn him concerning his rights. The rule would not

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[31] Cf. note 35 infra; Evans v. Rives, —— App. D. C. ——, 126 F. 2d 633.

[32] Comment, Duty of Judge to Inform Accused Indigent of His Rights (1941) 27 Iowa L. Rev. 133, and authorities cited.

[33] Cf. notes 34 and 36 infra.

be simple, easy or certain in administration. It should be so when fundamental rights of this kind are involved.

"Furthermore, as we have pointed out, the rule in the Kercheval and Heim cases does not contemplate exceptions. When account is taken of the reservation in the Wilson and Powers cases, and of the close affinity of the two pleas in all respects, the same policy as to both seems required in relation to knowledge and waiver.

"But if knowledge should be material, the facts in this case dictate the same result. *As with the right of counsel,*[34] *waiver of the privilege must be informed and intelligent. There can be no waiver if the defendants do not know their rights. The rule must be the same, we think, when the record is silent or inconclusive concerning knowledge. Basic constitutional protections, especially in criminal cases, should not be suspended by mere inferences from indifferent facts or doubtful presumptions, whether of law or of fact."*[35] (Italics writer's.)

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[34] Johnson v. Zerbst, 1938, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; Powell v. Alabama, 1932, 287 U. S. 45, 53 S. Ct. 155, 79 L. Ed. 158, 84 A. L. R. 527; People v. Napthaly, 1895, 105 Cal. 641, 39 P. 29; Cutts v. State, 1907, 54 Fla. 21, 45 So. 491; State v. Moore, 1900, 61 Kan. 732, 60 P. 748; cf. Palko v. Connecticut, 1937, 302 U. S. 319, 324, 58 S. Ct. 149, 82 L. Ed. 288; Patton v. United States, 1930, 281 U. S. 276, 308, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263; Ex parte Chin Loy You, D. C. Mass. 1915, 223 F. 833; Ex parte Riggins, C. C. N. D. Ala. 1904, 134 F. 404, 418; Sheppard v. State, 1928, 165 Ga. 460, 141 S. E. 196; State v. Briggs, 1905, 58 W. Va. 291, 52 S. E. 218; Williams v. State, 1924, 163 Ark. 623, 260 S. W. 721; Grogan v. Commonwealth, 1927, 222 Ky. 484, 1 S. W. 2d 779.

[35] Johnson v. Zerbst, 1938, 304 U. S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461: 'It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights,"' citing: Aetna Ins. Co. v. Kennedy, 1937, 301 U. S. 389, 393, 57 S. Ct. 809, 81 L. Ed. 1177; Hodges v. Easton, 1882, 106 U. S. 408, 412, 1 S. Ct. 307, 27 L. Ed. 169; Ohio Bell Telephone Co. v. Public Utilities Comm., 1937, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093. See also Evans v. Rives, —— App. D. C. ——, 126 F. 2d 633."

In *United States* v. *DePietro* (D. C., W. D. N. Y.), 36 Fed. Supp. 389, the Court, too, recognized that a defendant must be advised of his constitutional right and, at page 391, stated as follows:

> "This memorandum in no way denies the necessity of warning a person of his constitutional rights. It holds a sufficient warning was given in the instant case."

See also:

> *McNabb* v. *United States*, 63 Sup. Ct. 608, 318 U. S. 322.

The view taken by the Circuit Court in its opinion is opposed to the view as discussed in the cases analyzed herein.

POINT B

The arrest of petitioner was without probable cause and therefore illegal and all evidence obtained as a result thereof was not admissible against petitioner.

It was the contention of petitioner throughout the trial and in connection with the argument on the appeal that the arrest was without probable cause and therefore illegal and that all testimony relating to what transpired thereafter should have been stricken from the record.

The only reason that the officers gave for arresting Cryne is that he came out of the premises and entered the car with Meierdiercks, who was driving, driven away and returned and then driven away again. The officers admitted that at the time they had no reason to connect Cryne's actions with the presence of a still. Edward Bender in that connection testified as follows (fol. 103):

> "Q. You knew you were out on an investigation? A. I knew I was going on an investigation. I did not know if anything was there."

At folio 71 the witness Bender stated that he and his partner, Meyer, did not continue to follow Cryne and Meierdiercks the first time because Federal Agent Brady did not get to the premises in time and because "we did not know that there was a still there". Bender also testified that before he left for the investigation he had called Agent Brady (fol. 72). After Cryne's arrest Patrolman Bender telephoned to Agent Brady and told him to come right over and Brady then took over the handling of the case (fol. 78). From that point on Brady and two other federal agents conducted the investigation with Patrolmen Bender and Meyer assisting.

In re Schuetze, 299 Fed. 827, is a case in point. In that case the Government agents prearranged with the local police department to procure evidence against the defendants. The Court, in holding that the storage and seizure by police officers, without warrant, does not permit using the evidence seized upon trial of a federal violation, stated at pages 829 and 830 as follows:

> "Raiding methods of search and seizure to procure evidence without warrant find no support in the basic law of the land, and if government agents are permitted to prearrange with the local police department, as they did in this case, that premises of citizens suspected of violating the Volstead Act (Comp. St. Ann. Supp. 1923, Sec. 10138¼ et seq.) should be visited and searched without warrant for the purpose of using incriminating evidence for prosecutions in the federal courts, then the protection of the Fourth and Fifth Amendments, declaring the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and against self-incrimination, become empty phrases and of shadowy effect. A similar situation was presented in U. S. v. Falloco, supra, and Judge VanValkenburgh in a well considered opinion held that state police, under similar facts as here, became recognized agencies of the federal government in the enforcement of the prohibitory laws, and that their acts, arrests,

searches, and seizures in consequence came under the limitations imposed by the Federal Constitution. * * *

"* * * and since at the time of the seizure the officers engaged therein were co-operating with federal officials, they were required to strictly comply with the Constitution and laws of the United States. It makes no difference that the federal agent of this district was unaware of the specific search, or that he gave no instructions to the detective or policeman in relation thereto. It is enough that there was a general arrangement or understanding, express or implied, or an acquiescence to search premises pursuant to the ordinance of the city or directions of the police department and use the evidence and discovery for prosecution in the federal courts."

Also, in *United States* v. *Clark*, 29 Fed. Supp. 138, the Court, at page 141, stated as follows:

"While it is very doubtful whether the facts found make the ingenious theory now asserted at all applicable, we shall assume arguendo that they do and shall examine the validity of the theory. Does an officer of the municipal police, working under the direction of a federal narcotic agent, being advised by the agent that a certain person is committing a felony against the laws of the United States (although the agent had no reasonable ground for so believing) and being directed by the agent to arrest that person, have a lawful right to make the arrest?

"It seems clear that the question must be answered in the negative. The immunities granted by the Fourth Amendment would be valueless if they could be circumvented by a direction by a federal officer, with insufficient knowledge to justify an arrest by himself, to a state officer, working with and under him, to make the arrest and to follow it with a search. In that situation what is done by the state officer in reality is done by the federal officer. Byars v. United States, 273 U. S. 28, 33, 47 S. Ct. 248, 71 L. Ed. 520. Certainly the authority of the mere instrument and agent cannot rise higher than the authority of the superior and principal."

Since in the case at bar the federal agents could not have arrested the defendants or have made a search of the defendants, or the premises, without a warrant the arrest by the city police was also illegal and all evidence obtained as a result thereof was consequently not admissible.

The Circuit Court took the position that an arrest may be made upon hearsay evidence, and that the reasonable cause necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, but when the officers act upon information it is proper to compel them to disclose its source, subject to some limitations, because otherwise there would be no way to test whether they had reasonable cause of the arrest.

These general statements do not apply to the facts in the case at bar since the police officers who had arrested petitioner merely stated that all they knew was that they were out upon an investigation at the request of the federal agents but did not know anything else with respect thereto (fols. 103, 71).

It is clear that there was not sufficient hearsay evidence to create the probable cause necessary to warrant an arrest. It was not shown even by the federal agents that they had sufficient evidence or probable cause to warrant an arrest by them and it is clear that the police officers were in no better position than the federal agents. The evidence which was obtained as a result of such an illegal arrest should therefore have been stricken from the record on motion of counsel for petitioner.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its advisory powers in order that an important question of federal law may be settled as hereinabove discussed and that to such end a writ of certiorari be granted and this Court review the decision of the Courts below and finally reverse it.

ARCHIBALD PALMER,
Attorney for Petitioner.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:

Carroll v. *United States*, 267 U. S. 132	7
Husty v. *United States*, 282 U. S. 694	7
McNabb v. *United States*, 318 U. S. 332	6
Powers v. *United States*, 223 U. S. 303	6
United States v. *Block*, 88 F. 2d 618, certiorari denied, 301 U. S. 690	6
United States v. *Mitchell*, 322 U. S. 65	6
Wilson v. *United States*, 162 U. S. 613	6
Wood v. *United States*, 128 F. 2d 265	6

Statutes:

Internal Revenue Code:

Section 2803 (a) (26 U. S. C. 2803 (a))	3
Section 2810 (26 U. S. C. 2810)	2
Section 2814 (26 U. S. C. 2814)	2
Section 2834 (26 U. S. C. 2834)	2

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 154

MICHAEL J. CRYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 265–269) is reported at 149 F. 2d 105, *sub nom. United States* v. *Heitner.*

JURISDICTION

The judgment of the circuit court of appeals was entered on May 23, 1945 (R. 274), the same date that a petition for rehearing (R. 269–272) was denied (R. 273). The petition for a writ of certiorari was filed on June 22, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the

Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Petitioner was arrested by state officers without a warrant. Immediately following the arrest he voluntarily admitted possession of a still. The question presented is whether this admission and other evidence obtained as a result of the arrest were improperly admitted in evidence at petitioner's trial because (1) when questioned by the officers he was not warned of his constitutional privilege against self-incrimination, or (2) the arrest assertedly was made without probable cause.

STATEMENT

On May 5, 1942, petitioner, Morris Heitner, and Charles Meierdiercks were indicted in the United States District Court for the Eastern District of New York in five counts charging substantive violations of the Internal Revenue Code in connection with the operation of an illicit still, and a conspiracy. Count 1 (R. 8–9) charged that on or about January 20, 1942, the defendants possessed an unregistered still (26 U. S. C. 2810); count 2 (R. 9–10), that they illegally made and fermented mash (26 U. S. C. 2834); count 3 (R. 11–12), that they commenced the business of a distiller without filing a notice of intention to do so and without executing a bond (26 U. S. C. 2814); count 4 (R.

12–13), that they possessed certain distilled spirits without having paid the taxes on such spirits (26 U. S. C. 2803 (a)); and count 5 (R. 13–20), that they conspired from December 14, 1941, to January 20, 1942, to commit various offenses in violation of the Internal Revenue Code provisions relating to distillation. The case was severed as to Meierdiercks, and petitioner and Heitner were convicted on all counts at their jury trial (R. 240). Petitioner was sentenced generally to imprisonment for eighteen months and to pay a fine of $1,000 (R. 241). Upon appeals to the Circuit Court of Appeals for the Second Circuit, by petitioner and Heitner, their convictions were affirmed (R. 274).

The pertinent evidence may be briefly summarized as follows:

In December 1941, petitioner, accompanied by the defendant Meierdiercks, located a vacant house in New York City for the purpose of using it as a location for an illegal distillery (R. 59–60). With the approval of the defendant Heitner (R. 61) and with money furnished by him, Meierdiercks rented the house, using the name "Ralph Harrison" (R. 62, 91, 92, 94). After the three defendants had examined the house with a view to ascertaining what repairs would be required to permit the installation of a still, Meierdiercks and Heitner procured the necessary plumbing supplies and refitted the plumbing structure of the house so that

it would accommodate a still (R. 61–64, 67, 100, 144). Sugar for use in the still was furnished by Heitner and unloaded at the still site by petitioner and Meierdiercks (R. 65–66). Shortly after the still commenced operations, it was detected by the police and the defendants were taken into custody.

The facts relating to petitioner's arrest, and which are relevant to his contentions in this Court, show that on January 20, 1942, New York City police officers Bender and Meyer were assigned to investigate the still premises. Bender testified (R. 35), "we were on night duty. We had a call from 105th Precinct. We were on division duty. We went up to the 105th Precinct. They gave us the information and we went over to the premises." At about 8 o'clock, while the officers were watching the house, they observed petitioner and Meierdiercks leave the house and drive away in an automobile (R. 24, 42) After following the car for a brief period, the officers unsuccessfully sought to reach an agent of the Alcohol Tax Unit and then returned to the house in which the still was located (R. 24–25, 42–43). A few minutes later, the automobile in which petitioner and Meierdiercks were riding returned to the vicinity of the house to see, as Meierdiercks testified, if "anybody is around" (R. 68); in the words of officer Bender (R. 25), the defendants were "looking us over." Apparently the defendants recognized the officers' car as the one which had previ-

ously followed them, for they then drove away at a high rate of speed; the police gave chase and overtook them (R. 25, 43). Petitioner was directed to get into the police car, while officer Meyer got into Meierdierck's car (R. 25–26, 43). Just as petitioner was entering the police car, Bender heard something drop; he picked it up and it was later found to be a key to the house in which the still was located (R. 26, 69). On the way back to the house, Bender identified himself as a police officer and asked petitioner what he had in the house. Petitioner replied, "I will tell you, we have a small still there, 225 gallons." (R. 26.) The officers then contacted agents of the Alcohol Tax Unit and together they all returned to the house and examined the premises (R. 26–27). In the house the officers found a still-warm 374-gallon still, sugar, prune mash, and all the paraphernalia used in operating a still (R. 27).

ARGUMENT

1. The evidence principally involved in petitioner's contention is the testimony of police officer Bender that, after petitioner had been placed in the police car, petitioner "asked me who I was. I said I am a policeman. He said you are a policeman? I said, that is right. I said what have you got in this house. He said, I will tell you, we have a small still there, 225 gallons." Bender further testified that when they reached the house, Federal Agent Brady referred to the key found by

Bender (see p. 5, *supra*) and asked petitioner, "is this the key [to the house]. He [petitioner] said, try it and see. Then Agent Brady opened the door and we entered the house and found the still." (R. 26–27). This evidence was initially admitted without objection by petitioner, but at the close of the Government's case a motion to strike was denied and exception taken (R. 182–183). Petitioner now urges that Bender should have advised him of his constitutional privilege against self-incrimination and that failure to do so required that petitioner's admission be excluded.

Petitioner does not deny that his admission was voluntarily made with knowledge that he was talking to a police officer. There can be no question that the rule of *McNabb* v. *United States,* 318 U. S. 332, is not applicable to this case. *United States* v. *Mitchell,* 322 U. S. 65. In these circumstances, it is settled that the mere fact that the officer did not first caution petitioner that his answer might be used against him does not mean that the trial court committed reversible error in admitting the challenged evidence. *Wilson* v. *United States,* 162 U. S. 613, 623; *Powers* v. *United States,* 223 U. S. 303, 313; *United States* v. *Block,* 88 F. 2d 618 (C. C. A. 2), certiorari denied, 301 U. S. 690.[1]

[1] *Wood* v. *United States,* 128 F. 2d 265 (App. D. C.), relied upon by petitioner (Pet. 12–14), was expressly concerned with judicial admissions, and since non-judicial admissions were distinguished, the case does not aid petitioner.

2. While the record does not fully reveal the basis upon which the police acted in making the arrests, since no inquiry was made into that subject at the trial, it does show, as the court below concluded after reviewing the facts summarized at pp. 4–5, *supra*, that the police officers had a "belief reasonably arising out of circumstances known" to them that a felony was being committed. *Carroll* v. *United States*, 267 U. S. 132, 149; cf. *Husty* v. *United States*, 282 U. S. 694, 700–702. In the words of the circuit court of appeals (R. 267–268):

> * * * the policemen were not asked what was the information they had received at the "Precinct." Had that been done, it might have appeared that they did not have enough to go on; but, as the record stands, it is proper to infer that what they there heard related to the unlawful use of the building for the making or storing of alcohol, else they would not have tried to make contact with Brady as they did. The information which we infer they then got, coupled with the observed conduct of Meierdiercks and Cryne, gave them "reasonable cause" to make the arrest. It is true that there was nothing suspicious in the fact that these two entered a car outside the building, or that they returned after the policemen came back; but what then occurred was ample confirmation of the information which they already had. It will be remembered that the two suspects then appeared

> to the policemen to "look us over" and almost at once turned about and made off at such a burst of speed, as could have left no doubt in any reasonable mind that they were trying to escape arrest, and that they feared to be connected with what might be found in the building. * * *

CONCLUSION

The trial judge concluded from the evidence "that there is not the slightest doubt in my mind of the guilt of the defendants" (R. 242) and the court below stated that there was undoubtedly sufficient evidence to support the conviction (R. 265). The case presents neither a question of importance nor a conflict of decisions. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
JAMES M. MCINERNEY,
Acting Head, Criminal Division.
ROBERT S. ERDAHL,
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Attorneys.

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MICHAEL J. CRYNE,
Petitioner,

vs.

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Respondent

PETITION FOR REHEARING

ARCHIBALD PALMER,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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MICHAEL J. CRYNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices for the Supreme Court of the United States:

The petition of Archibald Palmer respectfully shows to this Court and alleges:

First. That your petitioner is attorney for Michael J. Cryne, the petitioner herein.

Second. That heretofore and on the 8th day of October, 1945 this Court denied a petition for a writ of certiorari herein.

Third. That the Government, in its brief, conceded that the record does not fully reveal the basis upon which the police acted in making the arrests, since no inquiry was made into that subject at the trial.

Fourth. That the Government's brief refers only to the following words of the Circuit Court of Appeals (R. 267-268):

> "* * * the policemen were not asked what was the information they had received at the 'Precinct.' Had that been done, it might have appeared that they did not have enough to go on; but, as the record stands, it is proper to infer that what they there heard related to the unlawful use of the building for the making or storing of alcohol, else they would not have tried to make contact with Brady as they did. The information which we infer they then got, coupled with the observed conduct of Meierdiercks and Cryne, gave them 'reasonable cause' to make the arrest. It is true that there was nothing suspicious in the fact that these two entered a car outside the building, or that they returned after the policemen came back; but what then occurred was ample confirmation of the information which they already had. It will be remembered that the two suspects then appeared to the policemen to 'look us over' and almost at once turned about and made off at such a burst of speed, as could have left no doubt in any reasonable mind that they were trying to escape arrest, and that they feared to be connected with what might be found in the building."

Fifth. That this whole line of argument is contrary to our principles of criminal law.

Sixth. That the Government had to prove the petitioner's guilt beyond a reasonable doubt and it was therefore the Government's duty to ask the policemen what was the information that they had received in the precinct.

Seventh. That if that had been done it might have appeared that they did not have enough to go on.

Eighth. That the decision of the Circuit Court of Appeals is contrary to the decision of this Court in *Scher* v. *United*

States, 305 U. S. 251, in which the conviction of the defendant was reversed on the ground that the Trial Court had ruled out some questions designed to learn the sources of the information on which the officers had acted.

Ninth. That there is no distinction between the *Scher* case, *supra,* and the instant case, since it was the duty of the Government, in order to establish the lawfulness of the arrest, to ask the officers as to the sources of the information.

Tenth. On the other hand, the Government in its brief stated that the case of *Wood* v. *United States,* 128 Fed. (2d) 265, does not aid petitioner upon the ground that said decision was expressly concerned with judicial admissions and distinguished from non-judicial admissions.

Eleventh. The Government, in attempting to make a distinction between non-judicial admissions and judicial admissions, refers to the cases of *Wilson* v. *United States,* 162 U. S. 613, and *Powers* v. *United States,* 223 U. S. 303, 313.

Twelfth. A careful analysis of the *Wilson* and *Powers* cases, *supra,* shows that the judicial or non-judicial character of the admission is only one of the elements to be considered in connection with the question whether a person under arrest has to be advised of his constitutional rights.

Thirteenth: The Circuit Court of Appeals seems to be of the opinion that in a case of a "casual" inquiry it may be commendable to caution an accused but it is not necessary where the answer is voluntary.

Fourteenth. Petitioner is of the opinion that it is absolutely necessary, in order to fully protect the constitutional rights of an accused, to caution him of such rights in a

casual inquiry for the reason that in such casual inquiry an accused is taken off-guard and does not fully realize the importance of his answers and, under such circumstances, what seems to be a voluntary answer may in fact be an involuntary answer.

Fifteenth. Your petitioner therefore asks for a rehearing so that this question, which has not yet been decided, may be passed upon by this Court.

WHEREFORE, your petitioner respectfully prays that this Honorable Court grant a rehearing of the writ of certiorari, and upon such rehearing grant the said application.

ARCHIBALD PALMER.

Dated, New York, November 1st, 1945.

CITY OF NEW YORK,
County of New York,
State of New York, ss:

Archibald Palmer, being duly sworn, deposes and says that he is the petitioner named herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

ARCHIBALD PALMER.

Sworn to before me this 1st day of November, 1945.

DOROTHY J. RESNIKOF,
[SEAL.] *Notary Public, Kings County.*

Kings Co. Clk's #510, Reg. #145-R-7. N. Y. Co. Clk's #517, Reg. #351-R-7. Commission expires March 30, 1947.

Certificate of Counsel

I, Archibald Palmer, counsel to Michael J. Cryne, petitioner named in the petition for rehearing, hereby certify that the petition on behalf of Michael J. Cryne for a rehearing of the application for a writ of certiorari is presented in good faith and not for the purposes of delay.

ARCHIBALD PALMER.

Dated New York, November 1st, 1945.